

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ANTONIO IBARRA LEMUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:99-CR-05344-AWI

**ORDER DENYING PETITIONER'S
MOTION TO CORRECT, VACATE OR
SET ASIDE HIS SENTENCE**

Doc. #'s 324, 326, 328 & 329

Petitioner Antonio Ibarra Lemus ("Petitioner") was convicted of possession of methamphetamine with intent to distribute and conspiracy on May 12, 2006, following a jury trial. Petitioner's motion for new trial was denied and judgment was entered on August 3, 2007. Appeal was taken and Petitioner's conviction and sentence were affirmed by the Ninth Circuit Court of Appeals on January 8, 2009. Notice of mandate was filed on January 30, 2009. No petition for writ of certiorari was filed, therefore Petitioner's judgment became final on or about March 1, 2009. Plaintiff filed a motion to correct, set vacate or set aside his sentence pursuant to 28 U.S.C. § 2255 on January 8, 2010 (Petitioner's "first 2255 Motion"). Petitioner filed the motion to correct vacate or set aside his conviction that is the subject of this order on July 22, 2013, (Petitioner's "July 22 Motion"). Petitioner's first 2255 Motion did not raise the issue – actual innocence -- that is presented by his July 22 Motion.

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2 Section 2255(h) generally bars a district court from considering the merits of a motion
3 under section 2255 that is “second or successive.” A petition is “second or successive” within
4 the meaning of subsection 2255(h) only if its claims were (1) raised in a prior petition and
5 determined on their merits, or (2) if the claims were not raised in a prior petition and the
6 petitioner’s failure to assert the claims earlier constitute an abuse of the writ. See Cooper v.
7 Calderon, 308 F.3d 1020, 1023 (9th Cir 2002). Because Petitioner’s July 22 Motion raises an
8 issue that was not raised in his first Motion, the July 22 Motion is not “second or successive”
9 within the meaning of section 2255(h).

10 Pertinent to this discussion, Section 2255(f) provides that “[a] one year statute of
11 limitations shall apply to a motion under this section. The limitations period shall run from the
12 latest of: (1) the date on which the judgment of conviction became final; [or] [¶] . . . ¶]; (3) the
13 date on which the right asserted was initially recognized by the Supreme Court, if that right has
14 been newly recognized by the Supreme Court and made retroactively applicable to cases on
15 collateral review.” In addition, section 2255(e) provides, *inter alia* that prisoner may have his
16 late-filed motion for habeas relief considered a motion pursuant to 18 U.S.C. § 2241 if his
17 remedy under section 2255 is “inadequate or ineffective to test the legality of his detention.”
18 This exception is referred to as the “savings clause” or the “escape hatch.” Muth v. Fondren,
19 676 F.3d 815, 818 (9th Cir. 2012). Courts in this circuit have been instructed that a petitioner
20 may be availed of the “savings clause” when he (1) “makes a claim of actual innocence, and (2)
21 has not had an unobstructed procedural shot at presenting that claim.” Marrero v. Ives, 682 F.3d
22 1190, 1192 (9th Cir. 2012).

23 Petitioner states the legal basis for his claim for habeas relief as follows:

24 In light of Alleyne v. United States, [--- U.S. ---, 133 S.Ct 2151 (2013)],
25 Petitioner is actually innocent of the offenses of “conspiracy to Distribute
26 Methamphetamine [sic], in violation of 21 U.S.C. § 846, 841(a)(1) and
Possession With Intent to Distribute and aiding and Abetting [sic] in
violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and his sentence for
Counts One [sic] and Count Two cannot be enhanced.

27 Doc. # 326 At 15.

28 Petitioner’s explanation of this court’s jurisdiction over his July 22 Motion is sketchy,

1 but the court interprets Petitioner's July 22 Motion to assert that, pursuant to Alleyne v. United
2 States, 133 S.Ct. 2151, (2013), his conviction was unlawful because the amounts of drugs
3 charged were not specified in the indictment and were not determined by the jury beyond a
4 reasonable doubt. Petitioner's argument implies that the rule announced in Alleyne is
5 retroactively applicable to his conviction and that the retroactive application has the effect of
6 rendering him "actually innocent" of the crimes of which he was convicted. The implication of
7 Petitioner's claim is that the court has jurisdiction to consider his claim because the right to
8 assert his innocence was initially recognized with the publication of the decision in Alleyne in
9 2013 and his July 22 Motion was filed within one year of that date in conformance with section
10 2255(f)(3). Petitioner's argument also implies that this court has jurisdiction over Petitioner's
11 claim through the savings clause of section 2255(e) because his claim of actual innocence
12 entitles him to have his claim considered pursuant to section 2241 which has no time limitation.

15 In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that any fact
16 that increased the statutory *maximum* sentence of a crime is an element of that crime to be
17 charged in the indictment and proven to a jury beyond a reasonable doubt. In Alleyne, the
18 Supreme Court applied the reasoning of Apprendi to hold that any fact that serves to increase the
19 statutory *minimum* of a crime, thereby effectively overruling the holding in Harris v. United
20 States, 536 U.S. 545 (2002). After Alleyne, any fact that serves to increase *either* the statutory
21 minimum sentence *or* a statutory maximum sentence is considered an element of the crime
22 charged and must alleged in the indictment and be found true beyond a reasonable doubt by a
23 jury. 133 S.Ct. at 2162-2163.

25 There are three reasons why Petitioner's July 22 Motion fails to allege facts sufficient
26 invoke the court's jurisdiction either by marking the limitations period pursuant to section
27 2255(f)(3) or by considering the Motion under section 2241 as allowed by section 2255(e) for
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1 claims of actual innocence. First, Petitioner's argument that the holding in Alleyne serves to
2 invalidate his conviction is deficient on its face because it does not allege that either the statutory
3 minimum or maximum of the sentencing range used to determine his sentence had been
4 increased due to a determination that some amount of methamphetamine was involved. Thus,
5 Petitioner's July 22 Motion fails to show that the holding in Alleyne has any application to
6 Petitioner's case notwithstanding any time limitation.
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8 Second, even if Petitioner had alleged facts to show he was sentenced under a sentencing
9 range that had been increased, Petitioner cannot invoke the new rule announced in Alleyne in
10 unless he can show that the rule has been made applicable retroactively to the time his
11 conviction became final in 2010; about three years before the decision in Alleyne. Generally,
12 "new constitutional rules of criminal procedure will not become applicable to those cases which
13 have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310
14 (1989). A new rule can be made retroactive only if: (1) the new rule is substantive, or (2) the
15 rule is a "watershed rule" of criminal procedure implicating the fundamental fairness and
16 accuracy of the criminal proceeding." Whorton v. Bockting, 549 U.S. 406, 416 (2007). With
17 regard to the rule in Alleyne, district courts in this circuit are guided by the appellate court's
18 holding in Hughes v. United States, 770 F.3d 814 (9th Cir 2014) which holds that Alleyne is
19 neither a substantive rule nor a watershed rule of criminal procedure and is therefore not
20 applicable retroactively. Hughes v. United States, 770 F.3d 814, 817-818 (9th Cir. 2014). The
21 court therefore concludes that Petitioner cannot avail himself of the rule in Alleyne because the
22 rule cannot be applied retroactively.
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24 Third, to the extent Petitioner seeks to invoke the court's jurisdiction under section 2241
25 by alleging he is "actually innocent" Petitioner has failed to allege facts to show "actual
26 innocence" within the meaning of the statute. In order to utilize the "actual innocence" gateway
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1 to relief under section 2241, a petitioner must allege facts that establish that in light of all the
2 evidence, it is more likely than not that no reasonable juror would have convicted him. Muth v.
3 Fondren, 676 F.3d 815, 819 (9th Cir. 2012). A showing of actual innocence for purposes of the
4 savings clause requires more than mere legal insufficiency. Bousley v. United States, 523 U.S.
5 614, 623 (1989). Here, Petitioner alleges only that, if Alleyne applied, his conviction would be
6 infirm due to a procedural error. There are no facts alleged in the July 22 Motion to hint, much
7 less prove, that Petitioner did not commit the acts constituting the crimes of which he was
8 convicted.
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10 The court concludes that Petitioner has failed to show that any provision of Section 2241
11 or section 2255 applies such that this court has jurisdiction to over Petitioner's late-filed July 22
12 Motion.
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15 THEREFORE, in consideration of the foregoing, it is hereby ORDERED that Petitioner's
16 Motion of July 22, 2013, to correct, vacate or set aside his sentence is DENIED.
17 Correspondingly, Petitioner's request of July 24, 2014, Docket Number 328, and the request
18 filed August 25, 2014, Docket Number 329. each requesting status information on Petitioner's
19 July 22 Motion are DENIED as moot. The court also notes that Petitioner's request filed at
20 Docket Number 324, is satisfied by the Court of Appeals filing at Docket Number 325.
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23 IT IS SO ORDERED.

24 Dated: August 28, 2015


25 SENIOR DISTRICT JUDGE
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